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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1553

UNITED STATES POWER SQUADRONS,
PALISADES POWER SQUADRON,

Appellants,

vs.

MARILYN C. HINDEN, DIVISION ON CIVIL RIGHTS,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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Motion to Dismiss

Pursuant to Rule 16(1)(b) of this Court, the Attorney General of the State of New Jersey, on behalf of appellees, hereby moves to dismiss this appeal on the grounds that it does not present a substantial federal question.

Question Presented

Is a state statute which prohibits sex discrimination in the membership practices of places of public accommodation repugnant to the First Amendment of the United States Constitution?

Counter-Statement of the Case

United States Power Squadrons ("USPS") is a non-profit organization (2T. 218-16 to 17)* with headquarters in Montvale, New Jersey (1T. 119-20 to 1T. 120-2), the objects of which:

> "shall be to establish a high standard of skill in the handling and navigation of yachts; to encourage the study of the science of navigation and small boat handling; to co-operate with the agencies of the United States Government charged with the enforcement of the laws and regulations relating to navigation and to stimulate interest in activities which tend to the up-building of our Army, Navy, Coast Guard, and Merchant Marine," 1970 Constitution of USPS, Article II (Aa48).**

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* Because the pages of the transcript of the hearing below are not numbered consecutively from volume to volume, they will be referred to as follows: The transcript of April 27, 1971, will be referred to as 1T; the transcripts of April 28, 29 and May 11, 1971 will be referred to as 2T, 3T, and 4T, respectively. These transcripts have been certified to this Court as part of the record below.

** This notation refers to the appendix filed by USPS with the Superior Court of New Jersey, Appellate Division, which was certified to the Court on February 10, 1976.

Palisades Power Squadron is one of the New Jersey divisions of USPS, the purposes of which are the same as those of the national organization. USPS offers a free basic piloting course which is open to any member of the general public, women as well as men, who wish to take it (1T. 32-1 to 3). This course, which Mrs. Hinden, the party complaining in the New Jersey Division on Civil Rights ("Division"), took and passed, is designed to impart knowledge in boat handling and piloting (1T. 36-6 to 10; 1T. 43-23 to 1T. 44-1). In additional fulfillment of its purposes, the organization offers advanced courses, promotes and participates in National Safe Boating Week and aides the United States Coast Guard in up-dating navigation charts and publishing a boating manual (Ra1 to Ra2).*

USPS engages in extensive advertising and public relations activities as an aid to the accomplishment of these purposes. In conjunction with the National Broadcasting Company, USPS has sponsored a television program which offers information about the organization as a public service (1T. 185-5 to 1T. 186-41). In the November, 1970 issue of "The Ensign", USPS's house organ, is an article entitled "Report of the Executive Department" (Ra1 to Ra2) which lists among the most important functions of the organization: (1) the cooperative charting program in which USPS through its local squadron members, cooperates with and aids the United States Coast Guard in constantly adjusting and correcting navigational charts of the nation's waterways; (2) the general promotion of safety and National Safe Boating Week; (3) "Governmental Liaison" work in order that "our name,

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* This notation refers to the appendix filed by the Division on Civil Rights with the Superior Court of New Jersey, Appellate Division, which was certified to the Court on February 10, 1976.

purposes and activities become increasingly well known in high places," as well as the work of the "Legislative Committee" which is constantly "working behind the scenes for the best interests of pleasure boatmen, . . . and meeting with individuals and State and National groups discussing these important legislative actions"; (4) public relations, specifically in that the Public Relations Committee is "making every attempt to see that USPS gets proper recognition for public consumption," and boosting the USPS in the "U. S. Treasury Department Safety Bulletin," "Business Management Magazine", and "Sports Illustrated" which are "a few examples of the continuous efforts of this Committee to enhance the prestige and growth of our organization"; (5) other governmental liaison work in that the Radio Technical Committee has "meetings at least monthly with the Coast Guard and U.S. Safety of Life at Sea Committee to insure full knowledge and consideration of USPS members and the general public's interest in rules and international agreements covering small boat use of radio and other electronic devices".

By its own admission, USPS has never considered itself a private social organization. While the group does sponsor a number of social activities for its members, the Chief Commander noted in November of 1970 that:

> ". . . over all the years our mission has been to teach safety in Boating, Seamanship etc.—not to be a fellowship and club organization" (1T. 178-23 to 1T. 179-7).

USPS and the locals often make use of public school facilities in conjunction with their teaching the basic piloting course. In addition, organization conferences are held at times on facilities owned by the Federal and various state governments (3T. 12-25 to 3T. 13-11). Public

marinas are used for certain activities (1T. 65-25 to 1T. 66-7).

Article IV of the 1970 Constitution of USPS provides further:

> "The Governing Board shall consist of the Chief Commander . . . and representatives of such Departments of the United States Government as may be elected by the Governing Body as *governmental* members thereof." [Emphasis added] (Ra4)

Thus, officials of government sit as members of the Governing Board of USPS in their official capacities, not as private citizens. In the December, 1970 issue of "Motor Boating" magazine, a general circulation publication, it is noted that nine officials of the United States Coast Guard and Navy were elected ". . . as Government Members of the USPS Governing Board. . . . This boosted to over 50 the number of senior military officers, who, in the words of the Chairman of the Governmental Liaison Committee 'lend their prestige to USPS work, increasing the pride the members have in the value of their membership and volunteer work. Liaison, mutual respect, and cooperation are encouraged, and the service rendered to the boating public enhanced.'" (Ra5)

All of the activities of USPS and Palisades, other than the basic piloting course and some of the advanced courses, are limited to the membership, the qualifications of which are: "Any male person, 18 years of age or over, having sufficient nautical knowledge, who is a citizen of the United States of America and who passes the prescribed examination. . . ." (Aa49). At the time of the hearing, a very large majority of the men who fit these qualifications was invited to join (4T. 13-24 to 4T. 30-23). Women may attend most functions of USPS and Palisades only as guests of members (2T. 294-14 to 15).

Complainant Hinden enrolled in the basic piloting course offered by petitioners. After completion of the course, she was asked by a member of Palisades if she would like to proctor future classes. She asked if she could join the organization and was told women could not. She thereupon refused to proctor (1T. 41-23 to 1T. 42-5). Thereafter she attended a ceremony at which all of the men who had passed the course at the same time as she had were sworn in as members of USPS and Palisades (1T. 46-24 to 25), while she and the other women who had passed were given "Woman's Certificates" stating specifically, "The granting of a Woman's Certificate does not confer upon the holder the right to fly the ensign of the United States Power Squadrons nor any rights of membership whatsoever" (1T. 43-17 to 22). After receiving the Woman's Certificate, complainant enrolled in an advanced course given by Palisades (1T. 54-8 to 10) wherein it was announced that an educational conference for members was to be held at Fort Schuyler under the auspices of the City University of New York, Maritime College (1T. 55-5 to 19). She asked if she could go and was told that no women were allowed to attend (1T. 56-9 to 17). Subsequent to this she filed a complaint with the Division on Civil Rights (Aa1).

ARGUMENT

The Appellants have not presented a substantial constitutional issue entitling them to appeal, because this case simply involves the factual application of detailed criteria as to the definition of a public accommodation, implicit in which is the recognition that freedom of association does not permit public entities to deny membership to persons or groups protected by anti-discrimination statutes.

The question presented, simply stated, is whether a state statute may prohibit an entity which has been held to be a place of public accommodation in accordance with detailed state and federal criteria from discriminating in membership policies against statutorily protected groups.

The decision of the New Jersey Division on Civil Rights, upheld by the New Jersey Superior Court, Appellate Division, concerning which certification was denied by the Supreme Court of New Jersey, was grounded upon extensive factual findings that appellants are places of public accommodation within the meaning of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* These findings must of course be accepted on appeal to the Court unless they lack a reasonable basis in the evidence. *Evco* v. *Jones,* 409 U.S. 91, 94 (1972); *Local Union No. 10* v. *Graham,* 345 U.S. 192, 197 (1952).

Decisions under both the New Jersey Law Against Discrimination and Title II of the 1964 Civil Rights Act establish conclusively that membership organizations which have been factually established as being public accommodations as opposed to private clubs, may not discriminate against statutorily protected groups in their membership admissions practices. *Tillman* v. *Wheaton,* 410 U.S. 431

(1973), *Smith* v. *Y.M.C.A. of Montgomery,* 316 F.Supp. 899 (N.D. Ala. 1970), mod. 462 F.2d 634 (5th Cir. 1972); *Nesmith* v. *Y.M.C.A. of Raleigh,* 397 F.3d 96 (4th Cir. 1968); *Clover Hill Swimming Club, Inc.* v. *Goldsboro,* 47 N.J. 25, 219 A.2d 161 (1966); *N.O.W.* v. *Little League,* 127 N.J. Super. 522, 318 A.2d 33 (App. Div. 1974) *aff'd sum.* 67 N.J. 329, 338 A.2d 198 (1974). The most notable case dealing with criteria for determining whether an organization is a public accommodation is *Tillman* v. *Wheaton-Haven Recreation Association,* supra, involving a non-profit corporation, the sole purpose of which was to operate a swimming pool and related amenities. Membership was limited in number and majority approval of a board of directors or of the general membership was required before an applicant could be admitted to membership. Only members and their guests could be admitted to the pool. The organization performed no public or "charitable" purpose. Yet this Court held that the association was a public accommodation under Title II of the 1964 Civil Rights Act, 42 U.S.C.A. 2000(a) reversing both the Court of Appeals and the District Court, for the reason that "membership 'is open to every white person within the geographic area, there being no selective element other than race'," 410 U.S. at 438, quoting from *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 234 (1969).

Similarly, the finding of the New Jersey Division on Civil Rights established that membership in USPS has always been open to virtually any and all men proclaiming interest in the organization upon their passing a basic piloting course while all women passing the same course are automatically excluded. Thus, USPS policies have comported with neither this Court's prerequisite for private clubs, nor those of the Supreme Court of New Jersey which held in *Clover Hill Swimming Club* v. *Goldsboro,* 47 N.J. 25, 34, 219 A.2d 161, 166 (1966):

> "The statutory exemption for distinctly private organizations is designed to protect the personal associational preferences of their members."

Significantly, as the stated purposes of USPS indicate, the reason for its existence is not solely or even substantially for the personal associational preferences of its members. As noted in Article II of the May 1970 Constitution of USPS:

> "The objects of the United States Power Squadrons shall be to establish a high standard of skill in the science of navigation and small boat handling; to cooperate with the agencies of the United States Government charged with the enforcement of the laws and regulations relating to navigation and to stimulate interest in activities which tend to the up-building of our Army, Navy, Coast Guard, and Merchant Marine." (Aa48).

The purposes of USPS have been expounded upon in articles of *The Ensign,* the official magazine of USPS, an example of which is quoted in the Counter-Statement of the Case, supra. Clearly then, the essential purposes of USPS do not relate in any substantial manner to personal associational preferences of members. Rather, any interested male having passed the minimum qualifying course has had the opportunity to join.

Appellants' assertion concerning the importance of personal compatability of members is further undercut by its own long-standing membership guidelines. Although "quality" of membership is mentioned in the "Procedural Manual for Membership Committees" quality is of concern primarily in relation to whether a member will help foster the publicly oriented work of the organization. The manual states:

> "Ideally EVERY GRADUATE of the Piloting Course should become an active member of USPS because he has shown an interest in boating education. If we hope to succeed in encouraging a high standard of skill among the millions of recreational boating people, we must have growth. However, (and this is most important) experience has demonstrated that the QUALITY of our membership is far more important than sheer numbers. In the long term, the quality of YOUR membership will present either a good or a bad Squadron image to your community." (Ra7) (Emphasis in original).

Furthermore, *Fraser* v. *Robin Dee Day Camp,* 44 N.J. 480, 210 A.2d 208 (1960), properly notes that in a public accommodation with closely interdependent units, all must be considered part of the organization for purposes of their being covered by the Law Against Discrimination. *See also Evans* v. *Ross,* 57 N.J. Super. 223, 229-230, 154 A.2d 441, 445 (App. Div. 1959), *certif. den.* 31 N.J. 292, 157 A.2d 362 (1960). In the case at bar, it is clear that the free basic piloting course, through which USPS accomplishes many of its purposes (Aa6), is inextricably enmeshed in the structure of the entire organization. It is in fact from this course that USPS has always gleaned all of its members and advertised various of its other activities (1T. 34-13 to 17; 38-13 to 18). Thus, even assuming part of its structure has some indicia of privateness, because of the public nature of its piloting course and its importance to USPS as a whole, the entire organization must be considered a public accommodation. It is thus abundantly clear that the finding below that USPS is a public accommodation was grounded upon a substantial factual record which, therefore, should not be disturbed by this Court, *Evco* v. *Jones, supra.*

Clover Hill v. *Goldsboro,* 47 N.J. 25, 34, 219 A.2d 161, 166 (1966) notes further that, "Self-serving declarations by the owner of an accommodation are not determinative of its character . . . In *Jones* v. *Haridor Realty Corporation,* 37 N.J. 384, 396 [181 A.2d 481, 487] (1962), we said: 'No device, whether innocent or subtly purposeful can be permitted to frustrate the legislative determination to prevent discrimination'." Thus, USPS cannot presently render itself immune from the Law Against Discrimination simply by proclaiming itself a private club when the totality of its structure and purposes have always been of a public nature.

The cases cited by appellants are simply inapposite. The dicta in *Bell* v. *Maryland,* 378 U.S. 226 (1964) and *Moose Lodge* v. *Irvis,* 407 U.S. 163 (1972) which notes a right of exclusion in one's home or private club assumes that a private club does in fact exist. A factual finding precisely to the opposite has been made in this case. In *N.A.A.C.P.* v. *Alabama,* 357 U.S. 488 (1958), the Court's prohibition of State interference was based on the State's failure to justify its need for the membership list in light of the repressive effect disclosure of membership would have had on the group. *Gibson* v. *Florida Legislative Committee,* 372 U.S. 539 (1963), rests on a similar fact foundation. Neither case involved the issue of an organization's right to exclude a statutorily protected group from membership.

In fact, courts have explicitly recognized limitations to the right of free association. In *Sigma Chi Fraternity* v. *Regents of University of Colorado,* 258 F.Supp. 515, 525 (D.Colo. 1966) it was held that college fraternities' freedom of association was not injured by a college regulation prohibiting discrimination on the bases of race, color or religion. After examining many of the cases upon which Appellants rely herein, the court noted: "It is

clear from an examination of these cases that the right of association is not, as plaintiffs have contended, an absolute right but is always subject to evaluation in relation to the interest which the state seeks to advance." In *U.S.* v. *International Longshoremen,* 460 F.2d 497, 501 (4th Cir. 1972), cert. den. 409 U.S. 1007, (1972) union officials opposed the merger of black and white locals. The court stated:

> "Their principal argument against the district court's decree is the claim that merger of the locals infringes on the workers' right to the freedom of association guaranteed them by the first amendment. This argument misapprehends the court's order. Merger will not prevent longshoremen from association to achieve economic and political goals. The order does no more than prohibit exclusion from association on the ground of race. There is no warrant in the Constitution for a union to retain, even by majority preference, racially segregated locals that tend to deprive some black members of equal employment opportunity. . . . The district court's order does not conflict with *NAACP* v. *Alabama,* 357 U.S. 499, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1950), and *Thomas* v. *Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945), on which the union primarily relies. These cases do not create a right in white men or black men to avoid association with persons of the other race. On the contrary they are leading authorities charting the right of all persons to associate for political and economic goals."

It is apparent, therefore, that no constitutional right of freedom to exclude based on sex exists for USPS which has been factually found to be a public accommodation.

Finally, USPS's desire to change some of its rules regarding membership procedures so as to "become" a private club is simply a clear effort to evade the Law Against Discrimination through subterfuge. It must be remembered that the issue of whether an organization is a public accommodation or a private club is substantially one of fact.* While an establishment may have some of the trappings of a private club, the totality of its organization and purpose is determinative of its true nature, *Tillman* v. *Wheaton-Haven Recreation Association,* supra, *Nesmith* v. *Y.M.C.A. of Raleigh,* 397 F.2d 96, 101 (4th Cir. 1968). Given this, in light of the totality of USPS's organization, its procedures, the publicity it generates, its links with government, concerning which extensive findings of fact were rendered at the hearing level, USPS cannot "become" a private club simply by purporting to change some of its membership practices.

This is not to say, of course, that should USPS cease to be that which it is, a public organization found and maintained to teach and foster boating safety and generally promote the interests of the boating public, it could not thereby become a private organization. It is clear from the briefs filed in this Court and below, however, that USPS has no intention of changing the basic character or purpose of the organization, which, in the very words of its Chief Commander is "to teach safety in Boating, Seamanship, etc.—not to be a fellowship and club organization."

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* It might also be noted at this juncture, and reemphasized as well, that this case involves only the facts surrounding the operation of USPS and not the Moose, Elks, Lions, New York Athletic Club, etc. Since a case involving any of these or any other organization would stand or fall on its own facts, USPS's exhortations that the Court save such organizations from governmental incursion into their privacy by noting probable jurisdiction herein is simply falsely premised.

It is thus clear that the Director's order prohibiting the implementation of stricter membership requirements for a limited period and providing that the standards formerly applied to men shall be applied equally to women, simply seeks to insure that USPS shall not evade said order by altering its membership criteria in a way which would have the effect of excluding women in an unlawfully discriminatory manner (Aa39 to 40). USPS cannot put on the robes of privacy for purposes of discriminating while essentially continuing to function in all other aspects as a public entity.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for lack of a substantial federal question.

Respectfully submitted,

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